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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted] 61

BEST & COMPANY, INC.

Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS AND MOTION TO STRIKE.

HARRY MCMULLAN,
Attorney General of North Carolina,
T. W. BRUTON,
Assistant Attorney General of North Carolina,
I. M. BAILEY,
Counsel for Appellee.

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No. 961

BEST & COMPANY, INC.

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vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

STATEMENT AGAINST JURISDICTION OF THE SUPREME COURT.

A. J. Maxwell, Commissioner of Revenue of the State of North Carolina, the defendant in the above entitled case, files herewith a statement of matters and grounds against the jurisdiction of the Supreme Court of the United States asserted by the appellant, as follows:

I. The Nature of the Case and the Ruling of the Court Below.

The applicant, under this heading, quotes from the opinion of the Supreme Court of North Carolina certain excerpts which are stated as the rulings of that court.

The opinion in its entirety must be considered as the ruling of the court, rather than disconnected portions quoted by the applicant. The opinion of the Supreme Court of North Carolina in effect held that the provisions of Chapter 127, Section 121(e), of the Revenue Act of 1937 imposing a tax upon the display of samples of goods in a hotel room or temporarily occupied house for the purpose of securing orders for the retail sale of such goods by any person, firm or corporation not a regular retail merchant in the State does not impose a burden upon interstate commerce and is valid, since the tax is imposed alike upon residents and nonresidents engaged in the activity defined and is a use tax levied upon the local use of hotel rooms and temporarily occupied houses for the purpose of promoting retail sales by persons not otherwise taxed as retail merchants, and since the activity taxed is a preliminary and nonessential activity transpiring prior to the securing of orders for interstate shipment, in which activity the seller may or may not engage at his election.

The opinion, in part, says:

> "It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, i. e., the display of samples, goods, etc., (b) the place, i. e., in a hotel room or temporarily occupied house, (c) the mental element, or purpose, i. e., for the purpose of securing orders for retail sale of goods, etc., and (d) the person, i. e., one not a regular merchant. In essence, the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, *who uses* a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. *It is a use tax,* levied in the State of North Carolina

upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular taxed retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against nonresidents. All citizens and residents of North Carolina, and nonresidents alike (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The taxed act is a local one, *involving the use of purely local property.*" (Emphasis ours.)

The very complete and lucid analysis by the Supreme Court of North Carolina of the taxing statute found in the opinion amply supported the conclusion reached by that Court, that the tax was a use tax imposed by the State of North Carolina on local property which might be used by the lessee for securing orders for local or interstate shipments of merchandise. The opinion of the Supreme Court of North Carolina provides a definite and complete construction of the act in question, at variance with the construction placed upon said act by the appellant.

The construction of a State statute by the highest court of the State is binding upon the Supreme Court.

Memphis & Ch. R. Co. v. *Pace*, 282 U. S. 241, 75 L. Ed. 315;

Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835;

Midland Realty Co. v. *Kansas City P. & L. Co.*, 300 U. S. 109, 81 L. Ed. 540;

Chicago M. & St. P. R. Co. v. *Sisty*, 276 U. S. 567, 72 L. Ed. 703;
Lauf v. *E. G. Shinner & Co.*, 303 U. S. 323, 82 L. Ed. 872;
J. Bacon & Sons v. *Martin*, 305 U. S. 380, 83 L. Ed. 233.

A close decision of the judges of the highest court of the State does not prevent the opinion of the majority from becoming the opinion of the court, which will be conclusive upon the Federal Court as to State law.

Williams v. *Eggleston*, 170 U. S. 304.

The appeal in this case, therefore, essentially involves the right of the State court to construe a State taxing statute and, in effect, asserts that the construction placed upon a State statute by the highest court of appeal in such State is not binding upon the Supreme Court of the United States. This is not a substantial question within the meaning of the rules of this Court, as it is believed the question has already been clearly and definitely otherwise determined by the cases above mentioned.

II. The Taxing Act Does Not Violate the Commerce Clause.

1. The tax imposed by the statute under examination is imposed upon the use of "any hotel room" or the use of "any house rented or occupied temporarily" for the display of samples, goods, wares, or merchandise.

Public Laws of 1937, Chapter 127, Section 121(e);
Best & Company, Inc. v. *Maxwell*, 216 N. C. 114.

Cases which condemn taxes levied by states directly upon the business of *offering for sale or selling goods* by a non-resident in interstate commerce, have no application to the tax here under consideration. *Robbins* v. *Shelby County*

Taxing District, 120 U. S. 489, and the other cases cited by Best & Company, Inc., under V of its brief in support of its petition for appeal, have no application to the tax here under consideration.

The taxing statute as construed by the Supreme Court of North Carolina, which is binding upon this Court, is excluded from the condemnation of the decision in the *Robbins* v. *Shelby County Taxing District* Case, *supra*, and similar cases, by the language of the opinion in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 308 U. S. —; 60 S. Ct. 388, in which it is said:

> "It is enough for the present purpose that the rule of Robbins *v.* Shelby County Taxing District, supra, has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

In the present case there is a fixed sum license, but as construed by the Supreme Court of North Carolina, the tax is not imposed on the business of soliciting orders for the purchase of goods to be shipped interstate, but is imposed for the use of local property in North Carolina.

2. The tax reaches those who are not regular retail merchants in the State of North Carolina as distinguished from regular retail merchants in the State of North Carolina. Retail merchants are defined in public Laws of 1937, Chapter 127, Section 404, subsection 5, and these retail merchants are taxed under Public Laws of 1937, Chapter 127, Section 405, for engaging in and conducting such business, and under subsection (6) of the same section 3% of the total gross sales. One not a regular retail merchant in North Carolina but engaging in merchandising by securing orders for the retail sale of goods, wares, or merchandise is subject only to the tax imposed by the statute under question.

The regular retail merchant in North Carolina is subject to other taxes, but it is by the statute under question that one not a regular retail merchant in North Carolina is made to bear some part of the cost of government. It is the nature of the business in which he engages that requires the fixing of a specified tax which is, though not stated in the law, in lieu of all other taxes to the State of North Carolina.

3. The tax imposed by the statute is not related to the movement of any article in commerce. It is not imposed for the movement in interstate commerce, nor does it relate to the right to move or to the offer to move an article in interstate commerce. It is the same for the use of the hotel room or the house independent of any sale, and accrues before any act is performed which may, coupled with other acts, result in the movement of an article in interstate commerce. The use of the hotel room or the house is taxed the same whether the use is by a resident of North Carolina or a non-resident of the State.

4. The privilege of use is only one attribute, among many of the bundle of privileges that make up property or ownership.

Henneford v. *Silas Mason Co.*, 300 U. S. 577.

This right of the State to tax the privilege of use is approved in the *Henneford* case.

5. The mere formation of a contract between persons in different States is not within the protection of the commerce clause.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, and cases cited therein.

In the instant case the plaintiff used a hotel room from which its representatives solicited orders. It is very sig-

nificant that in the *Western Live Stock* case the income taxed included that derived from an out-of-State advertiser who sent his cut to the publisher to occupy space in the magazine, the publishing of which solicited orders to be filled by the out-of-State advertiser. In many instances, no doubt, orders came from out-of-State readers of the magazine and thus the State was allowed to take tribute only because of the use of the magazine space to solicit orders. It is no less a use of property because the plaintiff in the instant case, chose to occupy a hotel room and not space in a magazine in North Carolina.

6. A definite separate act done or performed within a State may be taxed even where the act assists in a movement in interstate commerce.

Coverdale v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604.

In the *Coverdale* case the tax was applied upon the creation of energy which was used in pushing along, in its passage from one State to another, the contents of a pipe line used for interstate transportation.

In the instant case the hotel room is the "prime mover"—that place or thing giving the agent of plaintiff the opportunity to exert a push upon the commerce contemplated. The hotel room was the chamber in which the purchaser met the seller and made a contract. Into the hotel room came the prospective looker and buyer to produce the demand for the transmission of merchandise. The agent in charge was the medium through which the orders were taken and transmitted,—he was the compressor. Without the hotel room plaintiff in this case would have been without the place to produce the business which can be freely transmitted after this use of the room for the creation of the business. That use of that hotel room was just as much local as the use by a regular retail merchant as his store space is local.

7. The commerce clause does not close the door to the state's power to tax property used in connection with interstate commerce, nor does it prevent a tax upon the use of property within a State even where the use is in connection with interstate commerce.

Postal Telegraph-Cable Co. v. *Richmond*, 249 U. S. 252;

Eastern Air Transport, Inc. v. *Tax Commission*, 285 U. S. 147;

Nashville, Chattanooga & St. Louis Ry. v. *Wallace*, 288 U. S. 249;

Edelman v. *Boeing Air Transport, Inc.*, 289 U. S. 249.

If the tax under question compliments local taxes against regular merchants, it is not to be condemned because levied by the State of North Carolina.

General American Tank Car Corp. v. *Day*, 270 U. S. 367.

The rule stated in the above case is in the following language:

> "When the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against non-resident taxpayers, and in substance, does not do so, it is not invalid merely because equality in its equation, as compared with local taxation has not been attained with mathematical exactness."

III. The Taxing Act Does Not Violate Article IV, Section 2, or Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(1) At page 15 of its original brief, Best & Company states its second objection to the statute in question as follows:

> "II. The taxing action in question is unconstitutional also as offending against the privileges and immunities

and the equal protection of the law clauses of the Constitution of the United States, being Article IV, Sec. 2, and Amendment 14, Sec. 1."

The questions thus raised by Best & Company, before the Supreme Court of North Carolina under this second proposition, involve two provisions of the Constitution of the United States, namely (a) Article IV, Section 2, which entitles the citizens of each State to all privileges and immunities of citizens in the several States, and (b) the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment, Section 1.

(a)

Art. IV. Sec. 2:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Corporations are not citizens within the meaning of this clause but it applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed.

Paul v. *Virginia*, 8 Wall. 168;
Black v. *McClung*, 172 U. S. 239;
Sully v. *American Nat'l Bank*, 178 U. S. 289;
Norfolk & W. R. Co. v. *Pennsylvania*, 136 U. S. 114.

The appellant apparently abandons the contention of violation of Article IV, Section 2, of the Constitution, as such contention is not brought forward in the jurisdictional statement filed by appellant.

(b)

Amendment 14, Sec. 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1. It is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State.

Selover, B. & Co. v. *Walsh*, 226 U. S. 112;
Berea College v. *Kentucky*, 211 U. S. 45;
Liberty Warehouse Co. v. *Burley Tobacco Growers Co-Op. Marketing Asso.*, 276 U. S. 71;
Orient Ins. Co. v. *Daggs*, 172 U. S. 557;
Grosjean v. *American Press Co.*, 297 U. S. 233.

2. The classification in the act relates to those who are "not regular retail merchants" and has no relationship to citizenship or non-citizenship of the State. Therefore, Section 1 of the Fourteenth Amendment is not involved.

La Tourette v. *McMaster*, 248 U. S. 465, 39 Sup. Ct. Rep. 160, 63 L. Ed. 362 (1919).

This case was cited with approval and followed in later cases:

Maxwell v. *Bugbee*, 250 U. S. 525, 40 Sup. Ct. Rep. 2, 63 L. Ed. 1124 (1919);
Douglas v. *New York, N. H. and H. R. Co.*, 279 U. S. 377, 49 Sup. Ct. Rep. 355, 73 L. Ed. 747 (1929)

In the latter case the Court said at page 387:

"Construed as it has been and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such,

and none between non-residents with regard to these foreign causes of action. A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this court, emphasizing the difference between citizenship and residence, in LaTourette *v.* McMaster, 248 U. S. 465, 63 L. Ed. 362, 39 Sup. Ct. Rep. 160. Followed in Maxwell *v.* Bugbee, 250 U. S. 525, 539, 63 L. Ed. 1124, 1131, 40 Sup. Ct. Rep. 2. It is true that in Blake *v.* McClung, 172 U. S. 239, 247, 43 L. Ed. 432, 435, 19 Sup. Ct. Rep. 165, 'residents' was taken to mean citizens in a Tennessee statute of a wholly different scope, but whatever else may be said of the argument in that opinion (compare p. 262, id.) it cannot prevail over the later decision in La Tourette *v.* McMaster, and the plain intimations of the New York cases to which we have referred. There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned."

3. It is settled that the equal protection clause of the Fourteenth Amendment does not preclude the States from resorting to classification for the purpose of legislation, and this power of the States is of wide range and flexibility.

Colgate v. *Harvey*, 296 U. S. 404;
Royster Guano Co. v. *Virginia*, 253 U. S. 412;
Louisville Gas & E. Co. v. *Coleman*, 277 U. S. 32.

Classification must be based on a real and substantial difference. It may not be altogether illusory, but where there is a difference, it need not be great or conspicuous.

Southern R. Co. v. *Green*, 216 U. S. 400;
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389;
Colgate v. *Harvey*, 296 U. S. 404;
Royster Guano Co. v. *Virginia*, 253 U. S. 412;
Keeney v. *New York*, 222 U. S. 525;
State Tax Comrs. v. *Jackson*, 283 U. S. 527.

Equal protection is not denied merely by adjusting revenue laws and taxing systems so as to favor certain industry, even if the tax law favors a regular North Carolina merchant over one who is not a regular North Carolina merchant.

Irving v. *Kirkendall*, 223 U. S. 59;
Hammond Packing Co. v. *Montana*, 233 U. S. 331.

It is not the function of the Court to consider the propriety or justness of the tax, the motives for its enactment, nor the public policy which prompted it. The Court considers only the classification and it is enough if the classification is real and does not favor one as against another of the same class.

State Tax Comrs. v. *Jackson*, 283 U. S. 527;
Giozza v. *Tiernan*, 148 U. S. 657.

The questions involved, therefore, not being substantial, the appellee moves the Court that the appeal be not allowed.

Respectfully submitted,

HARRY MCMULLAN,
Attorney General,
T. W. BRUTON,
Assistant Attorney General.
I. M. BAILEY,
All of Raleigh, North Carolina,
Attorneys for the Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 961

BEST & COMPANY, INC.

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

MOTION.

Harry McMullan, Attorney General of North Carolina, respectfully moves this Court to strike from the record the license issued to Best & Company, Inc., by the Commissioner of Revenue for the State of North Carolina, referred to in the praecipe, indicating portions of the record to be incorporated into the transcript, as Item 6, and appearing in the record, for the reason that this license was not introduced in evidence and is not a part of the record below.

Respectfully submitted,

HARRY MCMULLAN,
Attorney General of North Carolina.